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No. 81-976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY DONOVAN LOWE,
Petitioner

v.

OHIO STATE BAR ASSOCIATION,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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Radio Station WOW, Inc. v. Johnson
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STATEMENT OF THE CASE

This case concerns an order of the Ohio Supreme Court suspending petitioner from the practice of law for an indefinite period. (Application for reinstatement may be made two years from suspension date.) Under the provisions of the Ohio Constitution (Article IV, Section 2(A)(g)) the Supreme Court has original and exclusive jurisdiction in admission to the practice of law and discipline of persons so admitted.

Respondent commenced these proceedings by filing a complaint against petitioner with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Gov. R. V of the Supreme Court's Rules for the Government of the Bar of Ohio provides that all proceedings in regards to complaints and grievances against lawyers shall be filed with and heard by the Board of Commissioners on Grievances and Discipline (hereinafter Board). The Board makes findings of facts and recommendations on discipline to the Supreme Court. In other words, the Board acts as a master commissioner or referee for the Supreme Court. 29 Ohio St. 2d xxix.

Petitioner's answer to the complaint generally and specifically denied the allegations against him.

A "pre-trial" hearing was held on June 29, 1979 before three members of the Board and, as a result, extensive stipulations were entered into by the counsel for petitioner, the petitioner himself and counsel for respondent. No federal question was raised at any of these proceedings.

Hearing on the complaint and answer was conducted by a three member panel of the Board on April 14, 15, 16, and 17, and June 16, and 17, 1980. Petitioner was present and represented by counsel. Thereafter, briefs in lieu of oral argument were filed by petitioner and respondent. In his reply brief in lieu of oral argument

before the Board, petitioner for the first time complained that the charges against him were "woefully lacking the requisite specificity which would satisfy the due process requirements of the Constitution of the State of Ohio and the Constitution of the United States."

On January 16, 1981 the Board filed its findings of fact and recommendation in the Supreme Court of Ohio, in which the Board found that petitioner had committed six violations of the Code of Professional Responsibility and recommended that three violations warranted a public reprimand and three warranted suspension from the practice of law for an indefinite period.

The Board did not rule on petitioner's contention that the charges against him lacked the requisite specificity to comport with due process of law.

On January 16, 1981, the Supreme Court issued its order to petitioner to show cause why the recommendation of the Board should not be confirmed and a disciplinary order entered.

Thereafter, petitioner filed his objections and supporting brief setting forth eight objections to the report of the Board. Pet. p. 54-55. The only federal question raised and briefed in the court below was petitioner's contention that DR 1-102 (A)(6) of the Code of Professional Responsibility is void for vagueness.

The case was then orally argued to the Court en banc.

Without passing on the federal question, the court below found the record evidence supported the Board's finding that petitioner's conduct violated DR 1-102 (A)(6), DR 1-102 (A)(3) and (4), DR 6-101 (A)(3), DR 7-102 (A)(3), and DR 9-102 (B)(1) and (3), of the Code of Professional Responsibility, and ordered petitioner suspended from the practice of law for an indefinite period.

Petitioner's motion for rehearing (Pet. p. 72-73) accused

the court below of failing to conduct an independent study of the record of the proceedings before the Board, the recommendations of the Board, and of delegating its responsibilities to the Board in violation of his procedural and substantive rights of due process of law. The motion for rehearing also contended that the seven disciplinary rules the court below found violated by petitioner are void for vagueness, and that the punishment of suspension from the practice of law under the record evidence of this case violates "the Eighth Amendment Cruel and Unusual Punishment Provisions and the Fourteenth Amendment." The motion for rehearing was denied without opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition. Therefore, this Court lacks jurisdiction to review those questions. Rule 21.1.(h).

The only federal claim raised and preserved in the court below was petitioner's contention that Disciplinary Rule 1-102 (A)(6) of the Ohio Supreme Court's Rules of Professional Responsibility[1] is void for vagueness, and its application to his conduct would deprive him of due process of law, etc. See Petitioner's Objections to Findings and Recommendations of the Board of Commissioners on Grievances and Discipline. Pet. p. 54-55. The Ohio Supreme Court did not decide that claim nor was such a ruling necessary to its decision. The court's order of suspension was based upon a finding of some six violations of the court's rules of professional responsibility. DR 1-102 (A)(6) was only one of the rules the court found was violated by petitioner. Pet. p. 65-69. Also violated were DR 1-102 (A)(3), illegal conduct involving moral turpitude; DR 1-102 (A)(4), conduct involving dishonesty, fraud, deceit or misrepresentation; DR 6-101 (A)(3), neglect of a legal matter entrusted to him; DR 7-102 (A)(3), concealing or knowingly failing to disclose that which he is required to reveal; DR 9-102 (B)(1), failing to promptly notify a client of the receipt of his funds, securities or other property; and DR 9-102 (B)(3), failing to maintain complete records of all funds etc. of a client coming into the possession of a lawyer and to render appropriate accounts

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[1] DR 1-1-2(A)(6) reads, "A lawyer shall not: Engage in any other conduct that adversely reflects on his fitness to practice law."

to his client regarding them. No federal claim was properly presented nor decided by the court below concerning the application of those disciplinary rules to petitioner's conduct. All that was claimed in the court below was that the evidence did not support a finding of violation of those rules. Petitioner's Objections to Findings of Board of Commissioners on Grievances and Discipline. Pet. p. 54-55.

Thus, without regard to the federal claim, the judgment and order of the Ohio Supreme Court rests on adequate and independent state grounds.

2. The Questions Presented for review here were first raised in the court below, in a general way, in petitioner's Motion for Rehearing. Pet. p. 72-73. The questions were not briefed, and no citations of authority were presented to support petitioner's argument. The Motion for Rehearing was denied without opinion. Pet. p. 75.

Under such circumstances those questions are ordinarily not reviewable here.

> "Questions first presented to the highest State court on a petition for rehearing, came too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition." (Citation omitted.) *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128.

It is true that petitioner's brief in lieu of oral argument filed with the Board raised a question of lack of specificity in the charges against him. (Pet. p. 4) The question was not supported by citation, brief or argument, and it was not passed upon by the Board in its report of its Findings of Fact and Recommendation filed in the Ohio Supreme Court. Pet. p. 35-51.

Petitioner filed eight separate objections to that report in the court below, but not one of those objections raised the question of lack of specificity of the charges. Of course, the court below did not pass upon that question.

Therefore, this court lacks jurisdiction to review that question. Rule 21. 1. (h).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing brief have been mailed by first class mail with postage prepaid to Counsel for Petitioner, Stanley E. Preiser, Preiser and Wilson Legal Corporation, Post Office Box 2506, Charleston, West Virginia, 25329. December 23, 1981.

Respectfully submitted,

John R. Welch